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Arbitration—Arbitrator to Decide Extent of Damages

Joseph DeMarie

tografica etc.,[13] decided by the Court a month after the *Exercycle* case. In the *DeLaurentiis* case, petitioner, seeking a stay of arbitration, contended that a contract between himself, a film distributor, and an author for production and distribution of a film, leaving to future agreement approval of a story outline and scenario, was illusory; therefore, he was not bound by the arbitration agreement embodied in the allegedly invalid contract. The Court, citing the *Exercycle* case, held that "it is for the arbitrators to decide what, under all the circumstances, these covenants contemplated. . . ."[14]

Although the Court has recognized that they are bound by their decision in *Exercycle* to refer the issue of mutuality to arbitration, it appears that they are nevertheless deciding that very issue themselves when they state:

> Thus, in addition to the implication of good faith read into every contract (see Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214), we had an express promise of consultation and of good-faith effort to bring to completion a scenario of such form and quality as to be acceptable.[15]

It is submitted, therefore, that the Court is retreating somewhat from its position in *Exercycle*.

Although the *DeLaurentiis* case leaves us with some doubt as to the Court's convictions concerning the power of an arbitrator to decide the issue of mutuality of contract, the *Exercycle* case is still the law in New York. Therefore, an attorney faced with a problem concerning the validity of an arbitration contract must first decide whether his case fits under the factual pattern of *Exercycle* (or *DeLaurentiis*) or the *Wolff* case, since the answer will dictate whether a court of law or an arbitrator will decide the issue.

J. D.

ARBITRATOR TO DECIDE EXTENT OF DAMAGES

In *DeLaurentiis v. Cinematografica, Etc.*, [16] petitioner (producer of motion pictures) and respondents (a film distributor and an author) entered a written agreement whereby they were to do what was necessary for the production and distribution of a motion picture. The contract further provided that any dispute arising thereunder should be submitted to arbitration under the rules of the American Arbitration Association in New York City. Under the agreement, petitioner covenanted to prepare a story outline and scenario, subject to respondent's approval. Respondents, through their New York agents, alleged that petitioner had never performed any of his obligations under the contract and sought arbitration, claiming among other damages, loss of profits and loss of business reputation. Petitioner's agent wrote a series of letters to respond-

13. 9 N.Y.2d 503, 215 N.Y.S.2d 60 (1961).
14. Id. at 510, 215 N.Y.S.2d at 64.
15. Id. at 509–510, 215 N.Y.S.2d at 63.
16. DeLaurentiis v. Cinematografica, Etc., 9 N.Y.2d 503, 215 N.Y.S.2d 60 (1961), affirming 12 A.D.2d 467, 207 N.Y.S.2d 317 (1st Dep't 1960).

ent's agents, requesting an extension of time to allow petitioner to decide whether or not to participate in the arbitration proceedings. Petitioner did not participate in any arbitration but responded to the demand by initiating the present action for a stay. He alleged: 1) that the agreement was illusory and therefore unenforceable; and 2) assuming that the contract was valid, certain of the claims constituted consequential damages, which are not recoverable in arbitration.

Special Term denied the motion, finding that petitioner had participated in the arbitration proceedings by seeking the extensions of time and was therefore precluded from contesting the validity of the contract.[17] However, the Court of Appeals felt that such requests for extensions of time did not constitute "participation" in the arbitration proceeding within the meaning of subdivision 2 of Section 1458 of the New York Civil Practice Act, as that term was construed by this Court in *In re National Cash Register Co. (Wilson)*.[18]

In answer to petitioner's contention that the contract lacked mutuality, the Court, relying on their ruling in *Exercycle Corp. v. Maratta*,[19] held that this issue is to be decided by the arbitrators.

Petitioner's second ground for the stay—that respondents sought consequential damages not recoverable under the rule in *Marchant v. Mead-Morrison Mfg. Co.*[20]—was also held to be within the arbitrator's jurisdiction because of the broad provisions of the arbitration clause.

In the *Marchant* case, relied on by petitioner, the Court held that the arbitration clause, by its narrow scope, was not intended to include damages purely consequential by nature. The Court, however, stated that:

> Parties to a contract may agree, if they will, that any and all controversies growing out of it in any way shall be submitted to arbitration. . . . A submission so phrased, or in form substantially equivalent, does not limit the authority of the arbitrators to any adjudication of the breach. It is authority to assess the damages against the party in default.[21]

This writer submits, that in view of the above statement, the Court's decision in the present case is a sound one. Petitioner, by not performing any of his obligations under the contract, never allowed the agreement to reach the point where profits could reasonably be expected. It was his inaction that prevented the realization of profits. Evidence of his inaction should properly be put to the arbitrator before the damages sought may be said to be "purely consequential." This is precisely what the Court has said in the majority

17. DeLaurentiis v. Cinematografica, Etc., 26 Misc. 2d 371, 207 N.Y.S.2d 20 (Sup. Ct. 1961).

18. 8 N.Y.2d 377, 208 N.Y.S.2d 951 (1960). See student note on this case appearing p. 82 infra.

19. 9 N.Y.2d 329, 214 N.Y.S.2d 353 (1961). See student note on this case appearing p. 75 supra.

20. 252 N.Y. 284, 169 N.E. 386 (1929).

21. Id. at 298-299, 169 N. E. at 391.

opinion. They will let the arbitrator decide after hearing all the evidence, whether respondents seek consequential damages, or whether their claim has merit.

The *DeLillo Const. Co. v. Lizza & Sons* case,[22] also relied upon by petitioner, dealt with a narrow arbitration clause such as the one found in the *Marchant* case and is therefore not applicable here where the clause was determined to be broad in its scope.

The dissent in the case at bar, relying on the majority's concluding statement,[23] believes that this decision would bar the court from hearing any motion to stay an award, claiming the statement makes the decision of the arbitrators "final and conclusive in any event." However, the majority explicitly stated that any determination "*in advance*" of arbitration would be inappropriate. (Emphasis added.)[24] This leads the writer to the conclusion that where the arbitration clause is broad enough, the court will allow any claim of damage to go to the arbitrator, reserving in the parties the availability of Article 84 of the New York Civil Practice Act to contest the legality of an award in an appropriate court of law. This is consistent with the wording and intent of the appropriate Sections of Article 84 (Sections 1462-1462-a). It may also ease the court's task of determining the validity of an award, because, when an action would be brought before them under these Sections, it would be after the arbitrator has heard all the evidence on both sides; and since he usually is someone familiar with the industry (if not a member of it) his decision would probably reflect the general attitude of that industry about such damages, thereby allowing the court to better achieve the intent of the parties when they entered into the agreement.

J. D.

STAY OF PROCEEDINGS BROUGHT BEFORE FEDERAL ADMINISTRATIVE AGENCY IN VIOLATION OF ARBITRATION AGREEMENT

In *S. M. Wolff Co. v. Tulkoff*,[25] the parties engaged in telephone conversations concerning the purchase of imported horseradish roots. The petitioners (brokers) thereafter mailed to respondents two "Bought Notes," covering the purchase in question, which contained broad arbitration clauses. Upon the arrival of the goods, they were accepted and paid for by respondents. Thereafter respondents lodged a preliminary complaint with the United States Department of Agriculture,[26] claiming that the shipments failed "to grade according to contract." After a hearing at which the parties failed to reach a settlement, respondents lodged a formal complaint with the Department of

22. 7 N.Y.2d 102, 195 N.Y.S.2d 825 (1959).
23. DeLaurentiis v. Cinematografica, Etc., supra note 1 at 510, 215 N.Y.S.2d at 64.
24. Ibid. See Matter of Transpacific Transp. Corp. (Sirena Shipping Co., S.A.), 9 A.D.2d 316, 321, 193 N.Y.S.2d 277, 283 (1st Dep't 1959).
25. 9 N.Y.2d 356, 214 N.Y.S.2d 374 (1961), reversing 11 A.D.2d 656, 203 N.Y.S.2d 1020 (1st Dep't 1960).
26. Perishable Agriculture Commodities Act, 7 U.S.C. § 499(f) (1958).